No. 93-376

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

KEY TRONIC CORPORATION,
Petitioner,

VS.

UNITED STATES et al.,
Respondents.

STANTON ROAD ASSOCIATES,
Petitioner,

VS.

LOHREY ENTERPRISES, INC.,
ELECTRONIC VALET SYSTEMS, INC.,
DAVID LOHREY and NATHAN PANG,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari should be granted so as to determine whether the federal Superfund statute contains explicit congressional authorization for the recovery of attorneys' fees in private party cost recovery actions brought thereunder.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Lohrey Enterprises, Inc., Electronic Valet Systems, Inc.,[1] David Lohrey and Nathan Pang respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in *Stanton Road Associates v. Lohrey Enterprises, Inc., et al.* That opinion is reported at 984 F.2d 1015 (9th Cir. 1993).

[1] Lohrey Enterprises, Inc. and Electronic Valet Systems, Inc. have no parent companies and no subsidiaries.

STATUTE INVOLVED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. §§ 9601 *et seq.*, commonly referred to as "Superfund." Petitioner claims that Congress must have explicitly authorized private party recovery of attorneys' fees when it defined the word "response" in CERCLA section 101(25), 42 U.S.C. § 9601(25), to include "enforcement activities," and authorized private parties in CERCLA section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), to recover "necessary costs of response."

STATEMENT OF THE CASE

Respondents adopt and incorporate herein the Ninth Circuit's statement of facts set forth in Section I of its opinion in *Stanton Road Associates*. 984 F.2d at 1016-1017.

On appeal, the Ninth Circuit reversed the district court's award of attorneys' fees to Stanton Road Associates under CERCLA, holding that the words "enforcement activities" as used in CERCLA's definition of the word "response" do not constitute explicit congressional authorization for the recovery of attorneys' fees. *Id.* at 1019. In so holding, the Ninth Circuit applied the American Rule as articulated in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975) and *Runyon v. McCrary*, 427 U.S. 160, 185, 96 S.Ct. 2586, 2602, 49 L.Ed.2d 415 (1976) (recovery of statutory attorneys' fees requires "explicit congressional authorization"). *See* 984 F.2d at 1018-1019. Noting that other provisions of CERCLA explicitly authorize recovery of attorneys' fees (e.g., 42 U.S.C. §§ 9604(b) and 9659(f)), the Ninth Circuit cautioned:

> If Congress determines that an exception to the American Rule is appropriate in private response actions, it will do so in explicit terms as it has previously done in other parts of CERCLA.

984 F.2d at 1020. Congress has the opportunity to make that determination in the ongoing Superfund reauthorization hearings.

REASON FOR DENYING THE WRIT

A. CONGRESS HAS THE OPPORTUNITY IN THE ONGOING SUPERFUND REAUTHORIZATION HEARINGS TO ELIMINATE INTERCIRCUIT CONFLICT BY CLARIFYING ITS INTENTION REGARDING PRIVATE ATTORNEYS' FEES.

In *Braxton v. U.S.*, ___ U.S. ___, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991), this Court recently chose not to resolve an intercircuit conflict where it determined Congress had authorized another body to resolve such conflicts. Similar discretion is appropriate here.

The petition in *Braxton* asked the Court, among other things, to resolve a circuit conflict over the interpretation of a provision of the U.S. Sentencing Commission's Guidelines Manual. 111 S.Ct. at 1857. After certiorari had been granted, the Commission requested public comment on the question presented in the first part of the certiorari petition, pursuant to its statutory duty to review and revise the Guidelines. *Id.* The Court concluded that by granting such authority to the Commission, Congress contemplated that the Commission would make clarifying revisions to the Guidelines necessary to resolve conflicting judicial decisions. *Id.* at 1858. "This congressional expectation alone," Justice Scalia wrote, "might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving [circuit] conflicts . . . ."[2] *Id.* Because the Commission had already "undertaken a proceeding that will eliminate [the] circuit conflict" (id.), the Court chose not to resolve the conflict.

The reasoning in *Braxton* applies here. A circuit conflict exists as to whether CERCLA authorizes the recovery of attorneys' fees in private party cost recovery actions. This Court has long

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[2]Justice Scalia further observed:

> [W]e are not the sole body that could eliminate such [circuit] conflicts . . . . Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute . . . .

Id. at 1857.

recognized that attorneys' fees are only recoverable under a federal statute if Congress explicitly authorizes them. *Alyeska, supra*, 421 U.S. at 269, 95 S.Ct. at 1627; *Runyon, supra*, 427 U.S. at 185, 96 S.Ct. at 2601. Congress, and not this Court, is best able to resolve the conflict by making a clarifying amendment to CERCLA. Funding for CERCLA will expire in 1994 (*see* 42 U.S.C. § 9611(a)), and CERCLA reauthorization hearings have already begun. Freeling, *Recovery of Attorneys Fees in CERCLA Private-Party Cost Recovery Actions: Striking a Balance*, 23 Envtl.L.Rep. 10477, 10480 & n. 35 (August 1993). As in *Braxton*, the circuit conflict can be eliminated in ongoing nonjudicial proceedings.

Rather than unnecessarily expend judicial resources now in an effort to determine Congress' intent, Congress should first be given the opportunity to address the issue. Denial of the writ is thus within the Court's sound discretion consistent with its ruling in *Braxton* and the interests of judicial economy.

B. THE NINTH CIRCUIT'S OPINION CORRECTLY APPLIES THIS COURT'S CONTROLLING PRECEDENT.

The manifestly correct ruling of the Ninth Circuit that the words "enforcement activities," as used in CERCLA, fail to explicitly authorize recovery of attorneys' fees in private party cost recovery actions, does not require this Court's plenary review.

It is a fundamental principle of American jurisprudence—the "American Rule"—that "absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation." *Runyon, supra*, 427 U.S. at 185; *Alyeska, supra*, 421 U.S. at 269. As the Ninth Circuit observed, "Congress has repeatedly demonstrated that it knows how to express its intention to create an exception to the American Rule." 984 F.2d at 1019. Indeed, it did so in at least two other provisions of CERCLA. *See* CERCLA § 310(f), 42 U.S.C. § 9659(f) (authorizing courts to award "costs of litigation (including reasonable attorney . . . fees)" to prevailing parties in citizens suits) *and* CERCLA § 110(c), 42 U.S.C. § 9610(c) (authorizing awards of "all costs and expenses (including the attorney's fees)" to whistleblowers).

Following *Alyeska*, and based on Congress' explicit provision for recovery of attorneys' fees elsewhere in CERCLA, the Ninth Circuit properly concluded that the phrase "enforcement activities" as part of the definition of the word "response" in CERCLA's definitional section does not *explicitly* authorize the recovery of attorneys' fees in private cost recovery actions.[3] 984 F.2d at 1019. As the Ninth Circuit observed, the term "enforcement activities" is "outside even the most exhaustive lexicon of customary fee shifting language." *Id.* (citation omitted). Indeed, the Court noted the very existence of a controversy as to whether the term "enforcement activities" is sufficiently explicit itself demonstrates that it is not. *Id.*

Because the opinion of the Ninth Circuit correctly restates and applies the American Rule as articulated in *Alyeska*, review on certiorari is not warranted. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J. dissenting) ("[t]he Court seldom takes a case merely to reaffirm settled law"); *cf.* Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L. Rev. 1015, 1027 (1984) ("the most common reason members of our Court vote to grant certiorari is that they doubt the correctness of the decision of the lower court").

C. THE QUESTION PRESENTED DOES NOT RAISE AN IMPORTANT ISSUE OF FEDERAL LAW THAT IS RIPE FOR ADJUDICATION BY THIS COURT.

Congress has never equated compensating counsel with environmental protection. And yet, petitioner pleads that its writ raises a question of "national importance" because the recovery of

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[3] The Eighth Circuit's construction of "enforcement activities" as including attorneys' fees is based on judicial policymaking—unsupported by CERCLA's legislative history—that recovery of attorneys' fees is warranted to further CERCLA's goals. *See General Elec. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1390 (1991). Such judicial legislation profoundly violates the American Rule. *See Alyeska, supra*, 421 U.S. at 260 (Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted").

attorneys' fees by private CERCLA parties allegedly promotes the cleanup of contaminated properties.[4] There is nothing in the language of CERCLA or its legislative history to support petitioner's policy pronouncement. *See In re Hemingway Transport, Inc.*, 993 F.2d 915, 934 (1st Cir. 1993) ("Congress did not consider, and SARA did not include, any attorney fee award amendment applicable to the private cost recovery provision").

To the contrary, there is evidence that the litigiousness fostered by the Superfund program is preventing the achievement of its goals. *See* Acton & Dixon, *Superfund and Transaction Costs: The Experience of Insurers and Very Large Industrial Firms* (RAND 1992), p. ix (CERCLA's "liability-based approach shrouds the program in litigiousness, slowing the pace of cleanups and creating steep transaction costs for private parties"); Freeling, *supra, Recovery of Attorneys Fees In CERCLA Private-Party Cost Recovery Actions: Striking a Balance*, 23 Envtl.L.Rep. at 10480 (August 1993) ("[p]arties seeking recovery from others might be more reasonable in their demands at the outset if their costs of litigation cannot be so easily shifted"). Indeed, EPA Administrator Carol M. Browner recently testified before Congress in the ongoing Superfund reauthorization hearings that "too much money is going to lawyers and not enough to cleanups." MacLachlan & Lavelle, *EPA Chief Decries Legal Bills*, Nat'l L.J., at 5 (May 24, 1993).

Such testimony and policy analysis as to the relationship between legal expenses and the goals of the Superfund program are properly raised in the legislative venue, not before this Court. Congress can amend CERCLA as it deems appropriate consistent

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[4] The Amicus Brief of Gloria Price in Support of the Joint Petition, dated September 17, 1993, most candidly discloses that the economic interest of plaintiff's *lawyers* is at stake. After lamenting that "[a]n unfortunate by-product of the adversarial system is that defendants with superior economic strength will often try to wear down a plaintiff financially," Amicus threatens that, absent the possibility of recovering attorneys' fees, "attorneys, such as [amicus' counsel], will not be willing to take cases such as the Price lawsuit [a private cost recovery action] on a contingency basis." Amicus Brief in Support of Joint Petition, at 9, 11.

with the legislative findings it ultimately makes. The narrow issue presented to this Court in the petition, however, does not legitimately encompass the policy concerns petitioner raises and has already been resolved in nearly 200 years of precedent establishing the American Rule. Accordingly, the current effort by certain interests within the legal profession to carve out an exception to that rule in the context of CERCLA private cost recovery actions is for Congress, not this Court, to debate. Having never explicitly provided for attorneys' fees, Congress has, in essence, once spoken—and has the opportunity to revisit the issue this Term.

CONCLUSION

For these reasons, respondents respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

RESPECTFULLY SUBMITTED this 30th day of September 1993.

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